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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 215.

THE ALASKA TREADWELL MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

PATRICK WHELAN, DEFENDANT IN ERROR

BRIEF FOR THE DEFENDANT IN ERROR.

OSCAR FOOTE,
For Defendant in Error.

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In the following pages the parties will be designated by their titles in this court.

The plaintiff in error was engaged in Alaska in mining and milling ores, and through its foreman, Finley, had employed the defendant in error to work about the mill.

While so engaged the defendant in error was seriously maimed and crippled and he brought action to recover damages for injuries received by the negligence of the plaintiff in error.

The complaint alleges that the defendant in error, while in the employ of the plaintiff in error, was severely and permanently injured by being drawn through a chute from the ore pit when, without his knowledge, the draw below was opened to load the cars used in conveying broken ore to the mill; that this injury occurred without negligence on his part, but by the negligence of the plaintiff in error.

The answer denies that the defendant in error was injured to the extent charged, or that his injury was caused by the negligence of the plaintiff in error, and sets up contributory negligence on the part of defendant in error.

The jury gave a verdict for the defendant in error for $2,-050.

The litigant mining company was granted a writ of error by the Federal Court of Appeals for the ninth circuit, and on re-

view said court of appeals affirmed the judgment of the United States District Court for Alaska (rec. p. 70 print).

The cause is now here on writ of error to said court of appeals.

THE ASSIGNMENTS OF ERROR.

On page 80, print, it will be observed that: "The plaintiff assigns the following errors committed by the Circuit Court of Appeals," to whom the writ of error in this cause is directed, and then follow seven assignments of error, numbered 11 to 17.

In the brief of the learned counsel for the plaintiff in error the "errors relied upon," and the only points of the case discussed, apply to and involve only the two questions—fellow servant and contributory negligence—therefore, we will accordingly confine our attention to those questions.

It is believed that there was no essential error in the court's modification of instructions No. 2. (Org. R. 101, print 56.) The jury was instructed upon all the issues in the case as favorably to the defendant as the law would warrant, and taking all the instructions and charge together, it does not appear that the jury could have been misled by the modification.

The jury must have found that the injury to the defendant in error was the result of Finley's negligence to give due notice when the rock in the chute was to be drawn. There was no negligence if Finley gave the notice, and the defendant in error would have got a verdict. The jury could not have found that Finley was incompetent. The jury was warranted in finding for the defendant in error if the notice was not given, for then the company, the plaintiff in error, was negligent through Finley, whose duty it was to give notice.

We fail to see how the modification could in any way work a prejudice to the plaintiff in error.

NEGLIGENCE OF THE MASTER.

Learned counsel for the plaintiff in error grant that the evidence shows affirmatively that the cause of the injury to the defendant in error was the negligence of Foreman Finley in

not notifying him when the ore was to be drawn from the chute.

This raises the question of the relation that was found by the jury to exist between the injured defendant in error and the plaintiff in error company, acting through its agent, Finley.

Upon this question depend all save one of the seven assignments of error, upon which the writ of the Circuit Court of Appeals is founded, and also whether there was error in overruling the motion to return a verdict for the defendant—the plaintiff in error here.

Reasonable protection and safety for the defendant in error while engaged in his work was an obligation upon the plaintiff in error. Due and fair warning that the chute was to be drawn was a duty that the plaintiff in error owed the employe.

The company could give such warning only through some agent or employe, specifically charged with that duty. It does not appear that the duty of the company was delegated to the general manager of the mine and mill, or to the superintendent, but it is in evidence (rec. pp. 38, 39 print) that such duty was delegated by the company to the foreman or "boss" of the department of work engaged in breaking and supplying ore to the mill.

The jury found, under the instructions (rec. p. 60), that Foreman Finley was employed and delegated to do the duties of the master, and that negligence in the performance of the duty thus delegated to him must be regarded as the negligence of the master.

The warning of Whelan was a duty the company owed him.

Wood, in his "Law of Master and Servant," writes:

"When a foreman or other person, by whatever name he may be known, is put by the master in his place to discharge some duty which the master owes to the servant, as to such duty he is not a co-servant, but a representative of the master. If the master delegates a duty to another he is answerable for the manner in which the duty is discharged, and he cannot screen himself from liability upon the ground that he has se-

lected a competent person to discharge the duty for him, for the duty is one which, in law, he is regarded as having contracted to discharge in person."

Though the evidence shows that Foreman Finley was, to the extent of hiring and discharging laborers, a representative of the principal (rec. p. 18.

"Q. You say Finley hired you?

"A. Yes.

"Q. Who was it Finley discharged?

"A. Dan Sullivan.

"Q. Who kept your time?

"A. I said Finley did."

Of another witness, p. 48.

"Q. Did the wages come through Finley?

"A. Yes, sir."

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"Q. Did you know of Finley hiring or discharging men?

"A. I know of his discharging two men.")

it may be reasonably contended that it is wholly immaterial whether he acted for the company in hiring the workmen or not. The test is, was he delegated to observe reasonable care and afford that protection that was due the workmen from the employer during the hazardous operation of drawing the chute while the workman was engaged at its head or mouth by the direction of the employer?

It has been enunciated in McKinney on Fellow Servants, sec. 23, that: "The true test, it is believed, whether an employe occupies the position of a fellow servant to another employe, or is the representative of the master is to be found, not from the grade or rank of the offending, or injured, servant, but it is to be determined by *the character of the act being performed by the offending servant by which the other employe is injured*; or, in other words, whether the person whose status is in question is charged with the performance of a duty which belongs to the master. The master, as such, is required to perform certain duties, and the person who discharges any of these duties, no matter by what name he may be designated,

cannot be a servant within the meaning of the rule under discussion."

We do not deny that the muscular operation of drawing the gate of the chute was a menial duty; but the duty of notifying the workmen in the mouth of the chute, relying and dependent upon due notice of danger, the duty of drawing the gate in such reasonable and safe manner as to guard and shield the workman from injury, was the lawful and bounden duty of the employer company.

"The master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the work to be done."

McGowan *v.* La Plata Mining Co., 3 McCrary, 393.

It is believed it can be reasonably stated that where a method or contrivance is used which is dangerous to the public or the workman, and the control of which is exclusively in the owner of such contrivance, or one acting for him, in such case the *value of human life* and the *dangerous character of the contrivance* make it public policy and create a rule of law that the owner, either directly or through the one in control, shall be held to the greatest care which human reason, foresight and skill can produce, and which is necessary to protect human life from the dangerous contrivance he has set in operation.

Horace Smith on Negligence, pp. 142 and 143;
Broom's Maxims of Law, p. 390;
Shearman and R. Negligence, sec. 683-691;
Union Pac. R. Co. *v.* McDonald, 152 U. S., 262.

Beach, in his justly eminent work on Contributory Negligence, in discussing the related question of fellow servant, says, sec. 302:

"The master, when taking a hand and engaging in common labor with the servant, does not thereby lose his position as master or become a fellow servant in such legal sense that the servant impliedly undertakes to assume the risk of injury from his negligence when so jointly injured."

Ryan *v.* Fowler, 24 N. Y., 410;
Anderson *v.* N. J. Co., 7 Robt., 611.

The authority just quoted further says:

"Where one servant is placed by the employer in a position of subordination and subject to the orders and control of another in such a way and to such extent that the servant so placed in control may reasonably be regarded as representing the master, when such inferior servant, without fault and while discharging his duty, *is injured by the negligence of his superior servant*, the master is liable in damages for the injury." (Sec. 325.)

In N. Pac. R. R. Co. *v.* Peterson, 162 U. S., 346.

The Supreme Court held that "if the master, instead of personally performing the obligations due his servant, engages another to do them for him, he is liable for the neglect of that other, which is not the neglect of a fellow servant, but of the master."

Vide Railroad Co. *v.* Baugh, 149 U. S., 369;
Vide U. P. R. R. Co. *v.* Daniels, 152 U. S., 684.

We invoke the law, as promulgated in these opinions, as well as the further ruling in the first named case, upon a collateral point, wherein the court says: "Where the business of the master is divided into departments of service the persons placed by the master in charge of these separate branches or departments, and *given control therein*, may be considered, with reference to employes under them, vice-principals and representatives of the master as fully as if the entire business of the master were under one superintendent."

With reference to the neglect of the master in the case under discussion, we believe a case in point is that of

Gilmore *v.* N. P. R. R. Co., 18 Fed. Rep., 860,

in which it appeared that the railroad company in building its road had many gangs of men at work at from three to five miles apart, under the control and direction of foremen, with

the power to employ and discharge, subject, themselves, to the control of a general superintendent, who passed along the line and inspected the camps at certain periods. Giant powder was used, and in such case the foreman was charged with the duty of handling the powder and thawing it when frozen.

The superintendent had given notice not to thaw powder before a fire, and provided a safe appliance called a "heater" for the purpose.

The plaintiff was employed in a gang where powder was being thawed without this safe appliance, and while assisting in so thawing the powder, by direction of the foreman, was injured by its explosion.

It was held that the foreman, so far, stood in the place of the defendant, that his directing the plaintiff to assist in thawing powder without using a means to avoid danger was an act of neglect for which the defendant was responsible to plaintiff.

Of equal directness of application is the case of

L. S. & Mich. R. Co. *v.* Levalley, 36 Ohio St., 221.

A foreman was in charge of a set of hands, repairing cars while on the track in the railroad company's yard, in which trains were accustomed to be made up; it was also the duty of the foreman to help with the hands in doing the work. While the foreman and a hand were engaged in repairing a car, and the latter was, by the foreman's order, at work under it, he was injured by another car moving on the same track striking the car under which he was.

It was held that it was the duty of the foreman, in putting the hand to work under the car, to use reasonable care to protect him from danger arising from switching of cars and the making up of trains on the same track, and for injury resulting from such negligence the company was liable.

In Ryan *v.* Bagaley, 50 Mich., 179,

it was held that "a 'mining captain' and the miners are not fellow servants." The mining captain in that case was subservient to a higher official, as has been claimed the foreman. Fin-

ley, was in this case at bar, but was superior to the miners under his direction.

In Berea *v.* Kraft, 31 Ohio, 287,

it was decided that "a mine foreman in charge of hands is not a fellow, but a superior, servant."

In Brown *v.* Sennett, 68 Cal., 225,

the foreman of laborers to whom a stevedore delegates the management of unloading a vessel was found to not be a fellow servant.

The same rule prevailed in

Mulcairns *v.* Janesville, 67 Wis., 24,

relative to the superintendent and workmen engaged in digging a cistern.

CONTRIBUTORY NEGLIGENCE.

There was no error in the Circuit Court of Appeals in finding that the trial court did not err in submitting to the jury the question of negligence on the part of the defendant in error. In determining this question the jury had to consider the surroundings in which the defendant in error was placed, the noise of the drills, the mouth of the chute being covered over with rock and the conflict of evidence as to whether or not Finley notified the plaintiff when the rock was to be drawn, made it the duty of the trial court to submit the question to the jury.

N. P. R. Co. *v.* Amato, 144 U. S., 467;
Kane *v.* Northern R. Co., 128 U. S., 91;
Jones *v.* E. Tenn. Co., 128 U. S., 443.

It is also believed that the Circuit Court of Appeals made no error in finding no error in the instructions as modified by the trial court as to contributory negligence of the defendant in error, the plaintiff below.

Beach, in his writings on Contributory Negligence, sec. 25, says: "When the defendant's negligence is the proximate cause, and that of the plaintiff is the remote cause, the plaintiff may have his action. And if the negligence of the plaintiff being only the remote cause, and the defendant might have avoided inflicting the injury by exercise of ordinary care, the action for damages is maintainable.

"The plaintiff's negligence must *substantially* contribute to produce the injury in order to avail the defendant."

We submit that the plaintiff's negligence to constitute a defence must have been so far an *efficient cause* of the injury, that without his negligence the injury would not have happened.

Vide Beach on Con. Negligence, sec. 19, et. seq.;
Kane *v.* N. Cent. R. Co., 128 U. S., 91;
Daley *v.* Norwich R. Co., 26 Conn., 591;
Grippen *v.* N. Y. R. Co., 40 N. Y., 34;
Steamboat Co. *v.* Vanderbilt, 16 Conn., 420.

Respecting the jurisdictional question discussed by our learned opponent, we admit the jurisdiction of the Circuit Court of Appeals in this cause, and the jurisdiction here.

Upon the foregoing points we respectfully submit that no error has been permitted and that the judgment should be affirmed.

OSCAR FOOTE,
For Defendant in Error.